THE PROGRESS OF THE LAW, 1918–1919

EQUITY (*Concluded*)

12. MARKETABLE TITLE

THREE cases involve different phases of marketability of title where the title depends on a question of fact and all parties who might claim are not before the court so that it cannot make the title marketable through a finding that title is good and a decree of specific performance. *Simpson* v. *Klipstein*[1] is a typical case. In *Boylan* v. *Wilson*[2] there was a misdescription in a deed in the chain of title which it would take parol evidence to correct. Should litigation ensue the evidence in a suit between purchaser and a possible claimant might be different from that adduced by vendor in the suit for specific performance. Hence the title could only be made marketable by a suit for reformation and it was the business of the vendor to bring this suit and remove the defect before calling upon purchaser to take the title.[3] In *Jamison* v. *Van Auken*[4] the title depended on adverse possession. Such a title may be marketable,[5] although it will not suffice where the

[1] 89 N. J. Eq. 543, 105 Atl. 218 (1918).

[2] 79 So. (Ala.) 364 (1918).

[3] Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114, 126 (1830).

[4] 210 S. W. (Mo.) 404 (1919).

[5] Sands *v.* Thompson, 22 Ch. D. 614 (1883); Beste *v.* McGaugh, 5 Pennewill (Del.), 258, 63 Atl. 28 (1904); Cherry *v.* Davis, 59 Ga. 454 (1877); Tewksbury *v.* Howard, 138 Ind. 103, 37 N. E. 355 (1893); Duetzmann *v.* Kuntze, 147 Ia. 158, 125 N. W. 1007 (1910); Keepers *v.* Yocum, 84 Kans. 554, 114 Pac. 1063 (1911); Logan *v.* Bull, 78 Ky. 607 (1880); Westerfield *v.* Cohen, 130 La. 533, 58 So. 175 (1912); Lurman *v.* Hubner, 75 Md. 268, 23 Atl. 646 (1892); Stewart *v.* Kreuzer, 127 Md. 1, 95 Atl. 1052 (1915); Aroian *v.* Fairbanks, 216 Mass. 215, 103 N. E. 629 (1913); Barnard *v.* Brown, 112 Mich. 452, 70 N. W. 1038 (1897); Hedderly *v.* Johnson, 42 Minn. 443, 44 N. W. 527 (1890); Waddell *v.* Latham, 71 Miss. 351, 15 So. 32 (1893); Ballou *v.* Sherwood, 32 Neb. 666, 695, 49 N. W. 790, 50 N. W. 1131 (1891); Ottinger *v.* Strasburger, 33 Hun (N. Y.), 460 (1884) (aff'd 102 N. Y. 692 (1886)); O'Connor *v.* Huggins, 48 Hun (N. Y.), 620, 1 N. Y. Supp. 377 (1888); Clarke *v.* Woolpert, 128 App. Div. 203, 112 N. Y. Supp. 547 (1908); Warne *v.* Greenbaum, 101 Atl. (N. J. Eq.) 568 (1917); Pratt *v.* Eby, 67 Pa. St. 396 (1871); Miller *v.* Cramer, 48 S. C. 282, 26 S. E. 657 (1896); Boggs *v.* Bodkin, 32 W. Va. 567, 9 S. E. 891 (1889); Summers *v.* Hively, 78 W. Va. 53, 88 S. E. 608 (1916).

In California a contract for a "perfect title" calls for one "fairly deducible of record" and a title by adverse possession will not suffice. Gwin *v.* Calegaris, 139 Cal.

contract calls for a "title of record." [6] It may be so indubitably good on the face of the evidence adduced by vendor that any reasonable purchaser ought to be satisfied and so it may be marketable.[7] Or the evidence may still leave a doubt, as distinguished from a "suspicion" in the court's mind.[8] Many courts have spoken as if this were the test. Thus in *Amery* v. *Grocock* [9] Sir John Leach, V. C., said:

"The . . . rule . . . seems to be, that if the Case be such, that sitting before a Jury, it would be the duty of a Judge to give a clear direction in favour of the fact; then it is to be considered as without reasonable doubt; but if it would be the duty of a Judge to leave it to the Jury to pronounce upon the effect of the Evidence, then it is to be considered as too doubtful to conclude a Purchaser."

This has been approved by the Court of Appeals in New York.[10] But it is subject to two observations. In the first place, when we say that the title must be free from reasonable doubt, we must mean not merely free from reasonable doubt in the mind of the court of equity passing on the suit for specific performance, but also free from reasonable possibility of doubt on the part of competent persons who may be called on to pass upon the title.[11] For

384, 73 Pac. 851 (1903); Crim *v.* Umbsen, 155 Cal. 697, 103 Pac. 178 (1909); Allen *v.* Globe Milling Co., 156 Cal. 286, 104 Pac. 305 (1909); Las Animas Co. *v.* Preciado, 167 Cal. 580, 140 Pac. 239 (1914) (*semble* "a title not deducible of record is clouded and unmerchantable").

In Oregon it is said that "a marketable title means one appearing to be such by the record of conveyances or other public memorial. It means that the title must appear of record and not rest in parol." Lockhart *v.* Ferrey, 59 Ore. 179, 183, 115 Pac. 431, 433 (1911). But in that case the contract called for "an abstract showing a marketable title." In Washington also it is said that a marketable title is one "that does not require the purchaser to inquire outside of the record." Watson *v.* Boyle, 55 Wash. 141, 104 Pac. 147 (1909); Coonrod *v.* Studebaker, 53 Wash. 32, 101 Pac. 489 (1909). In these cases too, however, the contracts called for abstracts showing title.

[6] Attebery *v.* Blair, 244 Ill. 363, 91 N. E. 475 (1910); Page *v.* Greeley, 75 Ill. 400 (1874); Zunker *v.* Kuehn, 113 Wis. 421, 88 N. W. 605 (1002).

[7] Tewksbury *v.* Howard, 138 Ind. 103, 37 N. E. 355 (1893); Gaines *v.* Jones, 86 Ky. 527, 7 S. W. 25 (1888); Arey *v.* Baer, 112 Md. 541, 76 Atl. 843 (1910); Forsyth *v.* Leslie, 74 App. Div. 517, 77 N. Y. Supp. 826 (1902); Alderman *v.* McKnight, 95 S. C. 245, 78 S. E. 982 (1913); Greer *v.* International Ship Yards Co., 43 Tex. Civ. App. 370, 96 S. W. 79 (1906).

[8] Shriver *v.* Shriver, 86 N. Y. 575, 585 (1881).

[9] 6 Madd. 54, 57 (1821).

[10] Shriver *v.* Shriver, 86 N. Y. 575, 584 (1881).

[11] "I think, therefore, that in these cases it is the duty of the Court not to have regard to its own opinion only, but to take into account what the opinion of other

the *jus disponendi* is one of the most valuable of the incidents of ownership, and the court of equity ought to be assured not merely that the purchaser will not be disturbed in his enjoyment of the property but also that he will be able to dispose of it to the ordinary, reasonably cautious buyer.[12] Again, it may be that a court would direct a verdict upon the case made by the vendor and yet a third person, not bound by the decree, who might later assert a claim, might well adduce further evidence that might affect the result. Hence the court of equity ought to be assured reasonably that the facts are as fully before it as they could be in any litigation over the title that may arise hereafter. This is particularly true where the title depends on adverse possession. If, therefore, whether or not the title is good may turn on a question of fact depending on evidence that may not all be before the court, the title ought not to be held marketable.[13]

Another question arose in *Jamison* v. *Van Auken*.[14] The contract called for delivery of "an abstract showing good and merchantable title." As generally understood by the courts, this means a title shown by the public records to be abstracted and is not satisfied by a title depending on adverse possession.[15] But the court,

competent persons may be." Turner, V. C., in Pyrke *v.* Waddingham, 10 Hare, 1, 8 (1852). The "judicial mind" spoken of in some cases must mean the judicial mind applied to the question how other competent persons would regard the title. Hedderly *v.* Johnson, 42 Minn. 443, 445, 44 N. W. 527 (1890); Bruegger *v.* Cartier, 29 N. D. 575, 581, 151 N. W. 34 (1915).

[12] A purchaser is entitled to a title such "as will bring, in the market as high a price with, as without the objection." Caton, J., in Brown *v.* Cannon, 10 Ill. 174, 182 (1848); Flood *v.* Von Macard, 102 Wash. 140, 147, 172 Pac. 884, 886 (1918).

[13] Watkins *v.* Pfeiffer, 29 Ky. L. Rep. 97, 92 S. W. 562 (1906); Trustees *v.* Rother, 83 Md. 289, 34 Atl. 843 (1896); Baumeister *v.* Silver, 98 Md. 418, 56 Atl. 825 (1904); Noyes *v.* Johnson, 139 Mass. 436, 31 N. E. 767 (1885); Conley *v.* Finn, 171 Mass. 70, 50 N. E. 460 (1898); Scannell *v.* American Soda Fountain Co., 161 Mo. 606, 61 S. W. 889 (1901); Sulk *v.* Tumulty, 77 N. J. Eq. 97, 75 Atl. 757 (1910); Freedman *v.* Oppenheim, 187 N. Y. 101, 79 N. E. 841 (1907); Weil *v.* Radley, 31 App. Div. 25, 52 N. Y. Supp. 398 (1898); Kahn *v.* Mount, 46 App. Div. 84, 61 N. Y. Supp. 358 (1899); Binzen *v.* Epstein, 58 App. Div. 304, 69 N. Y. Supp. 789 (1901); Carolan *v.* Yoran, 104 App. Div. 488, 93 N. Y. Supp. 935 (1905); Lalor *v.* Tooker, 130 App. Div. 11, 114 N. Y. Supp. 403 (1909); McLaughlin *v.* Brown, 126 S. W. (Tex. Civ. App.) 292 (1910).

[14] *Supra*, note 4.

[15] Page *v.* Greeley, 75 Ill. 400 (1874); Attebery *v.* Blair, 244 Ill. 363, 91 N. E. 475 (1910); Bear *v.* Fletcher, 252 Ill. 206, 96 N. E. 997 (1911); Knox *v.* Despain, 156 Ill. App. 134 (1910); Constantine *v.* East, 8 Ind. App. 291, 35 N. E. 844 (1893); Fagan *v.* Hook, 134 Ia. 381, 105 N. W. 155 (1907); Upton *v.* Smith, 183 Ia. 588, 166 N. W. 268 (1918); Lake Erie Land Co. *v.* Chilinski, 197 Mich. 214, 163 N. W. 929 (1917); Brad-

departing from the prior current of authority in that state, held that a marketable title depending on adverse possession and shown outside of the record and abstract would suffice. The same result was reached in *Kenefick* v. *Shumaker*,[16] which also departs from an earlier decision in the same state. Perhaps something must depend on the purposes for which land is bought and held, the practice of conveyancing and the form of the records in the particular state. As the Supreme Court of Washington says:

"Few persons care for that form of title which requires a resort to parol evidence to establish a link in its chain. And there is a well-founded reason for such dislike. Other conditions being equal, property so held is always passed by when offered for sale in competition with property held by title deducible of record. Such a title is more subject to attack by speculators in defective titles than is a record title, and when attacked more difficulty is experienced in establishing it than is in establishing the latter form of title. Land so held cannot be left vacant with the same safety as land held by title of record, and it seems that no matter how incontestable the parol proofs of title may be, a constant resort to the courts is necessary to enforce rights and contracts in connection therewith which pass unquestioned with other forms of title. For these and other reasons, such a title is undesirable." [17]

Without going as far as the courts of California, Oregon and Washington and holding that such titles are not marketable, we may see good reason why purchasers should contract, not merely for a good title, but for one which they may at any time show to be good by the public records. Where land is much bought and sold a contract calling for an abstract showing title may well mean more than a contract calling only for a marketable title in the sense which courts attach to that term. The Supreme Court of Missouri denies this, doubting whether a contract for a record title as distinguished from an "actual title" was ever intentionally made. It argues that the holder of the record title may not be the actual

way *v.* Miller, 200 Mich. 648, 167 N. W. 15 (1918); Thompson *v.* Dickerson, 68 Mo. App. 535 (1897); Bruce *v.* Wolfe, 102 Mo. App. 384, 76 S. W. 723 (1903); St. Clair *v.* Hellweg, 173 Mo. App. 660, 159 S. W. 17 (1913); McLane *v.* Petty, 159 S. W. (Tex. Civ. App.) 891 (1913); Moser *v.* Tucker, 195 S. W. (Tex. Civ. App.) 259 (1917).

[16] 116 N. E. (Ind. App.) 319 (1917).

[17] Watson *v.* Boyle, 55 Wash. 141, 143, 104 Pac. 147 (1908). "Titles by adverse possession are in disfavor with persons contemplating the purchase of property." Crocker Point Ass'n *v.* Gouraud, 224 N. Y. 343, 350, 120 N. E. 737 (1918).

owner and that actual ownership is the thing of paramount importance. But actual ownership is called for by the mere contract of sale without more.[18] It is important for the purchaser that vendor be both actual owner and owner of record. Hence when the contract calls for an abstract showing title in vendor it calls specifically for a substantial advantage to purchaser which he ought to be allowed to insist upon.

13. The Statute of Frauds

No less than twenty-three cases during the past year turned on alleged oral contracts to leave property by will,[19] or to adopt and leave property to the adopted person as to a child.[20] As one reads these cases he cannot but have an uneasy feeling that general expectations of becoming the object of a testator's bounty often ripen into a contract after testator's death. Where the courts do not require the acts of part performance relied upon to take the case out of the Statute of Frauds to be unequivocal and indubitably referable to a contract as to the very land in question, but are content with a case of great hardship upon plaintiff, it is not hard to do for the deceased by proof of his casual "admissions" in conversation over a series of years what the law would not have permitted him to do in person otherwise than by jealously guarded formalities. It is not merely the Statute of Frauds that is involved

[18] "It should be borne in mind that in contracts for the sale of real estate, an agreement to make a good title is always implied, unless the liability is expressly excluded." Sugden, Vendors and Purchasers, 14 ed., 16.

[19] Starrett *v.* Dickson, 136 Ark. 326, 206 S. W. 441 (1918); Trout *v.* Ogilvie, 182 Pac. (Cal. App.) 333 (1919); Kurtz *v.* De Johnson, 29 Cal. App. 246, 183 Pac. 588 (1919); Landrum *v.* Rivers, 148 Ga. 774, 98 S. E. 477 (1919); Stewart *v.* Todd, 173 N. W. (Ia.) 619 (1919); McInnerny *v.* Graham, 174 N. W. (Ia.) 395 (1919); Hoppes *v.* Hoppes, 124 N. E. (Ind. App.) 772 (1919); James *v.* Lane, 103 Kan. 540, 175 Pac. 387 (1918); Taylor *v.* Holyfield, 104 Kan. 587, 180 Pac. 208 (1919); Eastman *v.* Eastman, 117 Me. 276, 104 Atl. 1 (1918); Noyes *v.* Noyes, 233 Mass. 55, 123 N. E. 395 (1919); Fleming *v.* Fleming, 202 Mich. 615, 168 N. W. 457 (1918); Powers *v.* Norton, 174 N. W. (Neb.) 223 (1919); Gettins *v.* Boyle, 184 App. Div. 499, 171 N. Y. Supp. 711 (1918); Hermann *v.* Ludwig, 186 App. Div. 287, 174 N. Y. Supp. 469 (1919); Smith *v.* Furst, 186 App. Div. 452, 174 N. Y. Supp. 481 (1919); Herr *v.* McAllister, 181 Pac. (Ore.) 741 (1919); Williams *v.* Williams, 123 Va. 643, 96 S. E. 749 (1918); Alexander *v.* Lewes, 104 Wash. 32, 175 Pac. 572 (1918).

[20] Pantel *v.* Bower, 104 Kan. 18, 178 Pac. 241 (1919); Bromeling *v.* Bromeling, 202 Mich. 474, 168 N. W. 431 (1918); Ball *v.* Brooks, 173 N. Y. Supp. (N. Y. Misc.) 746 (1918); Wall *v.* McEnnery, 105 Wash. 445, 178 Pac. 631 (1919).

in these cases but the Statute of Wills as well. In a laudable desire to do justice to particular plaintiffs, courts of equity should not overlook the sound policy behind these two statutes. In too many American jurisdictions oral contracts as to disposition of property after the owner's death have come to be enforced against the owner's heirs or representatives much too lightly. Apparently to meet this mischief, California in 1905 added the following clause to the Statute of Frauds:

"An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will." [21]

May a case be taken out of the foregoing provision in equity by the same acts of part performance as would suffice for a contract of sale? This question was before the court in *Trout* v. *Ogilvie*.[22] After a provision substantially in the terms of section 4 of the Statute of Frauds, the Civil Code of California (sec. 1741) adds:

"But this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof."

It was considered that this proviso applied only to contracts for the sale of land and that a contract to leave property by will would not be taken out of the purview of the amendment to section 1624 by acts of part performance. The result is reached on the ground that section 1624 provides for seven cases, of which contracts for the sale of land are one and contracts to devise or bequeath are another, and that the exception in section 1741 by its terms applies only to the former. If a court were inclined to favor the taking of cases out of the statute, it might say that section 1741 was but declaratory of the pre-existing law, that the word "sale" had been construed to include contracts to leave by will or on intestacy [23]

[21] LAWS OF CALIFORNIA, 1905, p. 611. This provision is now subdiv. 7 of § 1624 of the Civil Code.

[22] 182 Pac. (Cal. App.) 333 (1919).

[23] Manning *v.* Pippen, 95 Ala. 537, 11 So. 56 (1891); Allen *v.* Bromberg, 163 Ala. 620, 50 So. 884 (1909); Mayfield *v.* Cook, 77 So. (Ala.) 713 (1918), but see Adams *v.* Adams, 26 Ala. 272 (1855); Gordon *v.* Spellman, 145 Ga. 682, 89 S. E. 749 (1916); Hoopeston Library *v.* Eaton, 283 Ill. 449, 119 N. E. 647 (1918); Wallace *v.* Long, 105 Ind. 522, 5 N. E. 666 (1885), distinguishing Lee *v.* Carter, 52 Ind. 342 (1876); Judy *v.* Gilbert, 77 Ind. 96 (1881); Wright *v.* Green, 119 N. E. (Ind. App.) 379 (1918); Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. 709 (1901); Gould *v.* Mansfield, 103 Mass. 408

and hence that the exception was meant to apply to all cases of contracts as to an interest in lands within the purview of the clause in section 4 of the Statute of Frauds. But the court's proposition that the amendment to section 1624 would thus be deprived of any real significance, since such contracts would be left exactly where they were before the amendment, is a weighty one; and in connection with the point that the whole doctrine of part performance is an anomaly, which ought to be held within narrow limits,[24] it seems conclusive. Thus the case is significant of a reviving regard for the policy of the statute on the part of American courts.

I have said that taking cases out of the Statute of Frauds by part performance is an anomaly. This proposition is disputed with

(1869); Lozier *v.* Hill, 68 N. J. Eq. 300, 59 Atl. 234 (1904); Gooding *v.* Brown, 35 Hun, (N. Y.) 148 (1885); Henning *v.* Miller, 66 Hun (N. Y.) 588, 21 N. Y. Supp. 831 (1893); Ludwig *v.* Bungart, 48 App. Div. 613, 63 N. Y. Supp. 91 (1900); Banta *v.* Banta, 103 App. Div. 172, 93 N. Y. Supp. 393 (1905); Howard *v.* Brower, 37 Ohio St. 402 (1881); Kling *v.* Bordner, 65 Ohio St. 86, 61 N. E. 148 (1901); Hopple *v.* Hopple, 2 Ohio C. D. 59 (1888); Brown *v.* Golightly, 106 S. C. 519, 91 S. E. 869 (1917), *aliter* as to contract to leave personalty, Turnipseed *v.* Sirrine, 57 S. C. 559, 35 S. E. 757 (1899); Campbell *v.* Taul, 3 Yerg. (Tenn.) 548 (1832); Goodloe *v.* Goodloe, 116 Tenn. 252, 92 S. W. 767 (1905); Henderson *v.* Davis, 191 S. W. (Tex. Civ. App.) 358 (1917); Hale *v.* Hale, 90 Va. 728, 19 S. E. 739 (1894); Swash *v.* Sharpstein, 14 Wash. 426, 44 Pac. 862 (1896); *In re* Edwall's Estate, 75 Wash. 391, 134 Pac. 1091 (1913); Soper *v.* Sheldon's Estate, 120 Wis. 26, 97 N. W. 524 (1903); Laughnan *v.* Laughnan, 165 Wis. 348, 162 N. W. 169 (1917); Horton *v.* Stegmyer, 175 Fed. (C. C. A.) 756 (1910); Quirk *v.* Bank, 244 Fed. (C. C. A.) 682 (1917).

A few jurisdictions construe the words of the statute literally and hold to the contrary: Stahl *v.* Stevenson, 102 Kan. 447, 844, 171 Pac. 1164 (1918) (contract to leave property generally, even if whole estate is land); *aliter* a contract to devise specific land, Nelson *v.* Schoonover, 89 Kan. 388, 131 Pac. 147 (1913); Myles *v.* Myles, 6 Bush (Ky.), 237 (1869), but see Gernhert *v.* Straeffer, 172 Ky. 823, 189 S. W. 1141 (1916); Woods *v.* Dunn, 81 Ore. 457, 159 Pac. 1158 (1916) (*semble*); Quinn *v.* Quinn, 5 S. D. 328, 58 N. W. 808 (1894).

If this latter view were to be taken, it could be argued that the amendment to the California code merely sought to bring that jurisdiction into line with the prevailing view and the arguments suggested in the text could be made on that basis.

[24] Lord Blackburn in Maddison *v.* Alderson, 8 App. Cas. 467, 489 (1883); Lord Redesdale in Lindsay *v.* Lynch, 2 Sch. & Lef. 1, 5 (1804); Kent, C., in Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131, 139 (1814), and Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. (N. Y.) 273, 284–285 (1814); Walworth, C., in German *v.* Machin, 6 Paige (N. Y.), 288, 293 (1837); Zabriskie, C., in Eyre *v.* Eyre, 19 N. J. Eq. 102, 104 (1868); Field, J., in Arguello *v.* Edinger, 10 Cal. 150, 159 (1858); Woodward, J., in Moore *v.* Small, 19 Pa. St. 461, 466 (1852); Sterrett, J., in Jamison *v.* Dimock, 95 Pa. St. 52, 56 (1880); Brickell, C. J., in Heflin *v.* Milton, 69 Ala. 354, 356 (1881); Hemphill, C. J., in Garner *v.* Stubblefield, 5 Tex. 552, 557 (1851); 2 STORY, EQUITY JURISPRUDENCE, §§ 1051–1052; BROWNE, STATUTE OF FRAUDS, 5 ed., § 492.

much ability in a recent paper,[25] on the basis of interpretation of the statute in the light of contemporary history, showing, as it is argued, that it was not intended to apply in equity at all. But the argument proves too much. If the author's thesis is sound, instead of taking cases out of the Statute where there was fraud or possession had been taken or there was part performance, courts of equity should have spoken thus: "Since with our modes of proof we can obviate the mischiefs of seventeenth-century jury trial, for which alone the Statute was devised, we will specifically enforce all contracts, written or oral, according to the general principles of our jurisdiction." What the courts actually did was to assume the Statute applicable in equity and then take particular cases out of its purview by reason of fraud or because the bargain was "executed" — and this from a time almost contemporary with its enactment.[26] The proposition had also been disputed by Lord Selborne on the ground that in these cases the court of equity does not enforce the contract but rather the "equities" of the plaintiff arising from fraud or part performance.[27] This *ex post facto* rationalization of what had gone on in equity for historical reasons, seems to be open to a conclusive objection. The courts have not enforced and do not enforce the equitable claims of the plaintiff arising from fraud or part performance as such, but rather the contract itself, exactly as if it were a legally enforceable contract for which the legal remedy was inadequate. The "equities" of one who has been put in possession or of one who has partly performed, call for making him whole for what he is out upon the faith of the contract, so far as a court of equity may do so. Hence they amply justify the view of certain southern courts which carry equitable relief so far as to give the purchaser an accounting and complete restitution, but no further.[28] Lord Selborne's theory, however, was not pro-

[25] Costigan, "Has There Been Judicial Legislation in the Interpretation . . . of the Statute of Frauds," Wigmore Celebration Essays, 473, 14 ILL. LAW REV. 1.

[26] The leading cases for the two types of taking out of the statute are Mullet *v.* Halfpenny, Prec. Ch. 404 (1699) and Butcher *v.* Stapely, 1 Vern. 363 (1685).

[27] Maddison *v.* Alderson, 8 App. Cas. 467, 475 (1883). This ingenious theory has been given much currency in recent American decisions by Professor Pomeroy, 2 EQUITABLE REMEDIES, 2 ed., § 2239.

[28] Grant *v.* Craigmiles, 1 Bibb, 203 (1808) and subsequent cases in Kentucky; Beaman *v.* Buck, 9 Sm. & M. 207 (1848) and subsequent cases in Mississippi; Albea *v.* Griffin, 22 N. C. 9 (1838), and subsequent cases in that state; Patton *v.* McClure, Mart. & Yerg. 333 (1828), and subsequent cases in Tennessee.

pounded to explain cases confining relief to restitution in equity but to meet those where the court of equity "takes the case out of the statute" and enforces the contract as such. It is important to insist that the taking of cases out of the statute is a historical anomaly, only to be understood by reference to seventeenth-century and eighteenth-century legal institutions and modes of thought in equity and that, like all historical anomalies of the sort, it defies logically satisfactory analytical treatment.

What is the actual situation? We say that for the purposes of courts of equity, cases are taken out of the purview of the statute in either of two ways: by fraud or by part performance. Recently there has been a tendency to run the two together, largely under the influence of Pomeroy's doctrine of "equitable fraud." [29] But they had an independent origin and have developed along independent lines. Hence they call first for independent consideration.

All the decisions on "fraud" as a ground for taking cases out of the statute refer directly or indirectly to *Mullet* v. *Halfpenny*.[30] There the contract was in writing, but the defendant fraudulently got possession of it so that plaintiff could not produce it. To-day, plaintiff would give him notice to produce and prove the contents of the writing by secondary evidence. In those days it could be said that as defendant himself had fraudulently created the obstacle to making the proof required by the statute, it was inequitable that he be allowed to take advantage thereof and hence that he should not be allowed to assert the statute. In another old case [31] a marriage took place on the husband's promising to settle certain property upon the wife according to his prior agreement. One may well feel that he did not intend to keep this promise when it was made. But perhaps such a state of facts was not actually proved, and the line between statements of fact as to one's present state of mind and promises as to one's future conduct was not well understood in 1720. At any rate the court distinguished cases of "reliance on the honor, word or promise of the defendant" from "cases of fraud," and put as an instance of fraud, "if one agreement in writing should be proposed and drawn and another fraudulently

[29] 4 POMEROY, EQUITY JURISPRUDENCE, 4 ed., § 1409 n.

[30] Prec. Ch. 404 (1699). Halfpenny *v.* Ballet, 2 Vern. 373 (1699), is evidently the same case.

[31] Montacute *v.* Maxwell, 1 P. Wms. 618 (1720).

and secretly brought in and executed in lieu of the former." Evidently the court had in mind cases where a defendant is held in equity to make good his representations after plaintiff has acted on them. Besides these cases of fraudulent creation of the bar and fraudulent representations acted on, the books speak of another case, namely, "a marriage brought about by fraud of the promisor." Statements to this effect go back to *Cookes* v. *Mascall*[32] and *Dundas* v. *Dutens*.[33] In the former, without fraud of any sort, a marriage settlement reduced to writing but not signed by either party, was decreed to be performed.[34] In the latter, Lord Thurlow said *obiter:* "If the husband made an agreement that he would settle and then in fraud of that agreement got married, would not he be bound by it?" Later English decisions make it very doubtful whether the inference drawn from these old cases can stand.[35] Of the American cases, *Peek* v. *Peek*[36] and *Allen* v. *Moore*[37] seem to hold that making a promise not intending to keep it and thus procuring a marriage, will take the case out of the statute. But in the latter there was no more than a breach of a promise as to what should be done after marriage. It is hard to find any actual fraud in the case as reported, and the authorities are properly against the proposition that non-performance of a promise relied on by the plaintiff is to be held "fraud" in this connection.[38] *Peek* v. *Peek* relies on *Green* v. *Green*,[39] a case of a radically differ-

[32] 2 Vern. 200 (1690).

[33] 1 Ves. Jr. 196, 199 (1790).

[34] This has much of the flavor of the strong-arm decisions of seventeenth-century chancellors in matters of family settlement. See the remarks of Lord Henley in Wycherley *v.* Wycherley, 2 Eden, 175, 177–178 (1763).

[35] In Caton *v.* Caton, 1 Ch. App. 137 (1865), intended husband and wife agreed upon a settlement before marriage. It was prepared accordingly, but they then agreed there should be no settlement, the husband promising her to make a will giving her all his property. The marriage took place and the will was made, but on the husband's death it was found he had made a later and different will. The court held the case was not taken out of the statute. In Wood *v.* Midgley, 5 De G., M. & G. 41, 45 (1854), Turner, L. J., says: "Is there then a case alleged by the bill of this nature, that the Defendant did by his fraudulent act prevent the agreement from being reduced to writing."

[36] 77 Cal. 106, 19 Pac. 227 (1888).

[37] 30 Colo. 307, 70 Pac. 682 (1902).

[38] But see the *dicta* in Wooldridge *v.* Scott, 69 Mo. 669, 673 (1879). These and other statements to the same effect (compare 1 POMEROY, EQUITABLE REMEDIES, 2 ed., § 2253, n. 63) are founded on Halfpenny *v.* Ballet, 2 Vern. 373 (1699), which is a poor report of Mullet *v.* Halfpenny.

[39] 34 Kan. 740, 10 Pac. 156 (1886).

ent type.[40] In the latter there is not a contract at all. In order to induce the marriage the intended husband made representations as to the property he then had, in which the wife would acquire certain homestead or other statutory rights upon marriage. Prior to the marriage he fraudulently conveyed the property to a grantee with notice. The wife having married him on the faith of his ownership of the property he and those who fraudulently held for him were compelled to make the representation good. Where there is no fraudulent creation of the statutory obstacle, no fraudulent representation that the statute has been complied with, and no case of representations, as distinguished from contract, which equity requires to be made good, there is excellent authority for applying the statute.[41] But the first two cases go on a sound general doctrine of equity [42] and the third is not within the letter nor the spirit of the statute.

There are two main types of case in which part performance is held to remove the bar of the statute. In one possession has been taken under the contract and that alone or something further done in connection therewith is taken to suffice. In the other possession is not possible and the part performance is had in some other way. Logically there would seem little ground for a distinction of this sort. But the cases here also developed along two lines and attempts in the last generation to bring the two together upon some common theory have succeeded more in appearance than in reality. Let us look briefly at each.

Before a decade had passed after its enactment, the Court of Chancery began to take cases out of the operation of the statute where purchaser had been put in possession under the contract.[43] Sugden long ago called attention to some old cases which indicate that this was the result of ideas as to livery of seisin.[44] Putting the purchaser in possession was taken to be the substance of a common-law conveyance. The rule thus derived became established in

[40] Of the same sort are Petty *v.* Petty, 4 B. Mon. (Ky.) 215 (1843); Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797 (1898).

[41] Hackney *v.* Hackney, 8 Humph. (Tenn.) 452 (1847); 1 STORY, EQUITY JURISPRUDENCE, § 768.

[42] Perhaps this is what really lies at the basis of the familiar saying that the doctrine "rests on estoppel." 3 POMEROY, EQUITY JURISPRUDENCE, 4 ed., § 1293.

[43] Butcher *v.* Stapely, 1 Vern. 363 (1685).

[44] VENDOR AND PURCHASER, 14 ed., 152 n. p.

England and in a majority of American jurisdictions. But its original basis was soon overlooked and attempts to rationalize the subject led writers and courts to turn to the idea of "fraud" in order to make a reasoned doctrine of "part performance" on the basis of the old cases where the chancellor had dispensed with the statute. Different developments of this idea gave rise to many varieties of doctrine. Thus we get to-day cases taken out by possession alone;[45] cases taken out by possession coupled with something else, arbitrarily prescribed by judicial decision or by statute;[46] cases taken out by possession when joined to circumstances of great hardship upon purchaser;[47] cases of part performance other than by taking possession, where there are acts solely referable to a contract as to the very land or showing a change in the character of the pre-existing possession,[48] and cases where it is not possible to take possession but relief is given on a theory of fraud or of irreparable injury to purchaser, without more.[49] It is significant that where the case admits of taking possession, taking or not taking possession is always made the decisive element in the result, if not in the reasoning. Even where it does not, if something can be strained into a taking possession, many courts have been willing to strain a point accordingly.[50] It is only where there is no possibility of possession that American courts have been willing to rely wholly upon theories of "equitable fraud." The results are intractable to analysis.[51] So far as not absolutely bound by authority as to particular situations of fact, the most that courts may do is to choose between a policy of departing widely from the spirit of the statute and giving relief on oral contracts in large classes of cases on a theory of fraud or of irreparable injury, or, on the other hand, a policy of holding to the spirit of the statute, and, except in those cases where foreclosed by

[45] See the cases cited in 1 AMES, CASES ON EQUITY JURISDICTION, 279, n. 1.

[46] CODE OF ALABAMA, § 2152; Heflin *v.* Milton, 69 Ala. 354 (1881); Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998 (1899). See 1 AMES, CASES ON EQUITY JURISPRUDENCE, 287–288 n.

[47] Burns *v.* Daggett, 141 Mass. 368, 6 N. E. 727 (1886).

[48] *E.g.*, Morrison *v.* Herrick, 130 Ill. 631, 22 N. E. 537 (1889).

[49] *E.g.*, Rhodes *v.* Rhodes, 3 Sandf. Ch. (N. Y.) 279 (1846) and like cases.

[50] *E.g.*, the doctrine of "dominant" possession: Watson *v.* Mahan, 20 Ind. 223, 226 (1863); Gupton *v.* Gupton, 47 Mo. 37 (1870).

[51] *E.g.*, in 36 Cyc. 672, treating of "dominant" possession, Professor Pomeroy makes an ingenious attempt to line the decisions up on some principle. But the cases cited in note 32 scarcely sustain the text.

authority in the particular jurisdiction, requiring a state of facts satisfying the policy of the statute and in addition thereto a case affording strong equitable grounds for going forward with the performance which the parties have begun.

There can be little doubt that this subject is closely connected with the attitude of seventeenth- and eighteenth-century courts toward statutes and with the large ideas of seventeenth- and eighteenth-century chancellors as to their power of making things over along ethical lines. As is well known, the courts of that time "manifested no small degree of hostility" to the Statute of Limitations and "sought out numerous contrivances to evade its most obvious provisions."[52] The doctrine of "acknowledgment" taking cases out of the Statute of Limitations, as it was down to the middle of the nineteenth century, bears a suggestive analogy to the doctrine of part performance taking cases out of the Statute of Frauds.[53] Moreover, down to the nineteenth century chancellors were zealous to make over bargains and generally to do what it seemed to each particular chancellor was required by the broad equities of the particular situation, with relatively little regard for the stability of transactions or security of acquisitions.[54] When chancellors held such ideas, a substantial livery of seisin, the substance of a common-law conveyance, or a serious hardship upon purchaser, which might be brought under the all-embracing and magic word "fraud" might well suffice to move them to dispense with a statute. When *Butcher* v. *Stapely* was decided, the air was full of ideas of natural law, on a higher plane than any human legislation, and the courts of law were about to decide that the king, in particular cases and

[52] Pritchard *v.* Howell, 1 Wis. 131, 135 (1853).

[53] In equity, provision by a testator in his will for the payment of all his "just debts" was held to waive the statute. Anon., 1 Salk. 154 (1689); Gofton *v.* Mill, 2 Vern. 141 (1690). Almost anything was tortured into an "acknowledgment" by courts of law. Trueman *v.* Fenton, Cowp. 544 (1777); Quantock *v.* England, 5 Burr. 2630 (1770).

[54] The student of equity will think at once of precatory trusts; of extreme cases of specific performance with compensation, such as Lord Thurlow's decrees, criticized by Lord Eldon in Drewe *v.* Hanson, 6 Ves. 675, 677–678 (1802); of the old decisions dispensing with performance of express conditions precedent; of Lord Thurlow's doctrine that time can never be made of the essence by mere agreement of the parties, Williams *v.* Thompson, NEWLAND, CONTRACTS, 2 ed., 238; of Lord Henley's proposition that courts of equity "attend to slight considerations for confirming family settlements" and "consider the ease and comfort and security of families" rather than whether there is a common-law contract. Wycherley *v.* Wycherley, 2 Eden, 175, 177–178 (1763).

"on necessary and urgent occasions," could in his discretion dispense with penal statutes.[55] If for good reasons James II might dispense with a statute of Charles II requiring public officers to take a test oath, Lord Jeffreys might well feel that James's chancellor, for good reasons, could dispense with another statute of Charles II, requiring contracts for the sale of land to be in writing. It is significant that at first there was a tendency to take cases out of the statute very freely, analogous to the tendency with respect to the Statute of Limitations already spoken of.[56] In the fore part of the nineteenth century there was a wholesome reaction, exactly as in case of the Statute of Limitations. Later, chiefly in the United States, there was a return to the older attitude and a movement to let down the bars with great liberality, — largely under the influence of attempts to rationalize the subject of part performance by means of theories of "fraud." In England a generation ago there was a second reaction toward stricter holding to the statute, and there are now signs of a movement in the same direction in the United States.

In so many jurisdictions the specific cases which will obviate the bar of the statute are so well settled that it may seem futile to essay any general theory. And yet many things remain unsettled. Hence some general idea as to the basis on which courts should act and some analytical conception of the subject of taking cases out of the Statute of Frauds, as a whole, will be useful in preventing the growth of further anomalies, in preventing the extension of old ones, and in laying the foundations for an ultimate putting of the subject into better order, whether by legislation or otherwise. From this point of view, what account may be given of the types of case heretofore considered? First we have the cases of "fraud" in the stricter sense. These may well stand, if we except certain *dicta*, on the familiar principle of that much-enduring word "estoppel" — that one who makes a representation for the purpose of inducing another to act on it, if the other so acts to his injury, must make good that representation. Second, we have the cases of possession, now become "part performance." Originally these went on the ground that there had been the substance of a com-

[55] Godden *v.* Hales, Comb. 21, 2 Shower, 475 (1686).

[56] Seagood *v.* Meale, Prec. Ch. 560 (1721); Lacon *v.* Mertins, 3 Atk. 1 (1743); Dickinson *v.* Adams, cited in 4 Ves. 722 (1799).

mon-law conveyance. As this was overlooked or forgotten, new explanations were sought. An early theory was that taking possession and holding it as owner, with the assent of the vendor, was something solely referable to a contract between the parties as to that very land, and hence calling for an explanation which would let in evidence of the contract.[57] Another was that taking possession is an act of part performance because "the party might be treated as a trespasser if he could not invoke the protection of the contract."[58] That is, being, as it were, seized through the substance of a common-law conveyance, the purchaser may go into equity to protect his equitable ownership *quia timet*. But we have here a transition to the idea of "fraud," and in consequence American courts have often called for something more than taking possession.[59] Thus we are led to the view well expressed by Lord Cottenham in *Mundy* v. *Jolliffe:*[60]

"Courts of Equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement."

Pomeroy developed this argument into a theory of "equitable fraud" as the basis of the doctrine,[61] which has had a wide influence in the United States and has given Lord Cottenham's theory general vogue in hard cases not admitting of the taking of possession.[62] I have already pointed out the effect of this gradual *ex post*

[57] Sir William Grant in Frame *v.* Dawson, 14 Ves. 386, 387–388 (1807); Wigram, V. C., in Dale *v.* Hamilton, 5 Hare, 369, 381 (1846); Seitman *v.* Seitman, 204 Ill. 504, 68 N. E. 461 (1903); Hersman *v.* Hersman, 253 Mo. 175, 161 S. W. 800 (1913).

[58] Field, J., in Arguello *v.* Edinger, 10 Cal. 150, 159 (1858).

[59] "In several jurisdictions . . . this reason, as applied to mere possession, is rejected as artificial and untrue in fact." 1 POMEROY, EQUITABLE REMEDIES, 2 ed., § 2239. See also *id.*, § 2243.

[60] 5 My. & Cr. 167, 177 (1839).

[61] 3 POMEROY, EQUITY JURISPRUDENCE, § 1297 (citing Mundy *v.* Jolliffe); 4 *id.*, § 1409, n.; Gallagher *v.* Gallagher, 31 W. Va. 9, 5 S. E. 297 (1888).

[62] Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54 (1894); Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4 (1899); Nowack *v.* Berger, 133 Mo. 24, 34 S. W. 489 (1896); Pflugar *v.* Pultz, 43 N. J. Eq. 440, 11 Atl. 123 (1887); Lothrop *v.* Marble, 12 S. D. 511, 81 N. W. 885 (1900); Bryson *v.* McShane, 48 W. Va. 126, 35 S. E. 848 (1900).

facto development of a theory in producing an artificial differentiation of cases according to the possibility of taking possession, and in fostering loose notions of possession in cases of contracts for support where vendor is to live on the land during his life and the purchaser is upon the land with him. The cases as to service rendered the vendor are also palpably influenced by the older decisions as to taking cases out of the statute by payment. May we give any satisfactory analytical account of such a situation? At any rate we may note that the prevailing theory, whether put as Lord Cottenham put it, or in terms of "equitable fraud" with Pomeroy, is not applied by courts to one of the strongest cases for its application, namely, payment of the purchase money to an insolvent vendor,[63] and this, it is significant to note, because such cases admit of taking possession. In truth it was devised to explain the cases where the situation does not admit of taking possession, just as the theory of acts solely referable to a contract as to the land was devised to explain the cases where possession is held to suffice. And this leads to the suggestion that each contains a part of the truth in that we really have two things to consider: (1) whether the policy of the statute is saved, and (2) whether there is something in the particular case that calls for dispensing with a formal compliance with the statute, its policy being saved, and makes it more equitable to go forward and complete what the parties have begun. The theory of acts solely referable to a contract as to the land shows us how to meet the policy of the statute. Lord Cottenham's proposition or the doctrine as put by Pomeroy, shows us how to determine what to do, if and when our first condition is satisfied. Lord Selborne in effect combined the two along this line in *Maddison* v. *Alderson*,[64] and gave us, it is submitted, the best rationalization of part performance to be found in the books. Thus the tendency of American courts to require something more than merely taking possession under the contract and the refusal of many courts to grant relief even in hard cases of service, where no possession is taken, without some act solely referable to the contract, are well justified and are in the right line of progress toward a satisfactory law upon this subject.

[63] Townsend *v.* Fenton, 32 Minn. 482, 21 N. W. 726 (1884); Bradley *v.* Owsley, 74 Tex. 69, 11 S. W. 1052 (1889); Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391 (1894).

[64] 8 App. Cas. 467, 475–476 (1883).

We may now examine the decisions of the past year in the light of the foregoing discussion.

Nothing new is brought out by the cases involving taking of possession. None of them involve possession without more. *Doty* v. *Rensselaer Insurance Co.*[65] is a case of possession coupled with expensive improvements, within the settled New York doctrine.[66] *Pearson* v. *Gardner*[67] and *Kemmerer* v. *Title & Trust Co.*[68] are cases of possession coupled with part payment. *Page* v. *Cave*[69] is a case of possession plus the rendition of services. In *Hudgins* v. *Thompson*[70] there was possession along with part payment and substantial improvements. In *Sizemore* v. *Davidson*[71] vendor was in possession under a contract to purchase public land. He sold by parol to purchaser who took possession. Under the doctrine prevailing in Kentucky, where part performance does not take a case out of the statute, it was held that after vendor had acquired a patent he could be prevented from asserting his legal title against purchaser until the equities between the parties had been adjusted. In other words, vendor was treated as equitable owner,[72] and his contract with purchaser as a conveyance of his equitable ownership within the Statute of Frauds.

Nor is there much new in the cases of continuance in possession or possession referable to some relation between the parties. *Ashcraft* v. *Tucker*[73] and *Casady* v. *Casady*[74] are ordinary cases of continuance in a prior possession. In the former there was the added circumstance of part payment, which standing alone, however, could not suffice.[75]

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[65] 188 App. Div. 29, 176 N. Y. Supp. 55 (1919).

[66] Dunckel *v.* Dunckel, 141 N. Y. 427, 36 N. E. 405 (1894).

[67] 202 Mich. 360, 168 N. W. 485 (1918).

[68] 90 Ore. 137, 175 Pac. 865 (1918).

[69] 106 Atl. (Vt.) 774 (1919).

[70] 211 S. W. (Tex.) 586 (1919).

[71] 183 Ky. 166, 208 S. W. 810 (1919).

[72] This is universally held in such cases. Russ *v.* Crichton, 117 Cal. 695, 49 Pac. 1043 (1897); Aldrich *v.* Aldrich, 37 Ill. 32, 36 (1865); Egbert *v.* Bond, 148 Mo. 19, 49 S. W. 873 (1899). Yet the contract is not enforceable in equity against the state nor indeed judicially at all, unless by way of *mandamus* where some ministerial act of an administrative officer is all that is required to pass title.

[73] 136 Ark. 447, 206 S. W. 896 (1918).

[74] 169 N. W. (Ia.) 683 (1918).

[75] So also in Starrett *v.* Dickson, 136 Ark. 326, 206 S. W. 441 (1918). In Hawley *v.* Wood, 184 Pac. (Cal.) 9 (1919) purchaser in an oral contract claimed that a tenant at will of seller had attorned to him. This was held insufficient. It may be sup-

In *King* v. *Hartley*[76] and *Le Vee* v. *Le Vee*[77] the contract was between tenants in common. The possession was referable to the relation and there was nothing to show any change in its character. In *Formby* v. *Williams*[78] a tenant in possession under a lease spread fertilizer over the land before the lease expired, relying on an oral contract for a new lease. Specific performance was denied on the ground that the acts relied on were not exclusively referable to the contract nor such as could "not be explained consistently with any other contract." Here, unlike *Mundy* v. *Jolliffe*,[79] the acts were such as the lessee could lawfully do by virtue of his tenancy, although it was not likely that he would unless he expected to stay beyond the term of his lease. They did not necessarily show a change in the character of his possession. *Brown* v. *Western R. Co.*[80] involved a contract to build a spur track and to give an easement of storing lumber on defendant's right of way. Plaintiff had seriously changed his position for the worse in reliance on the contract and had stored lumber on the right of way under it. In an able opinion, Lynch, J., points out the difference between such a case, where there is an actual contract, whether to lease the right of way for storage or to give an easement of storage, and the cases of parol licenses acted on. Here the storing of the lumber was necessarily referable only to some contract between the parties as to the use of the land by plaintiff, and the great hardship upon plaintiff after all that he had done made it more equitable to go forward than to try to undo it. The most notable thing about this group of cases is the strict insistence upon acts solely referable to a contract as to the very land or indubitably showing a change in the character of a pre-existing possession.

A number of cases involve contracts to devise land in return for services to be rendered during the owner's life. In *Taylor* v. *Holy-*

ported on the ground that what took place did not establish a change in possession amounting to the substance of a common-law conveyance. But Shaw, J., dissenting, argues convincingly against the technical criterion of the California cases, which call for such a possession as would make purchaser "liable for trespass."

[76] 123 N. E. (Ind. App.) 728 (1919).

[77] 181 Pac. (Or.) 351 (1919). Starrett *v.* Dickson, 136 Ark. 326, 206 S. W. 441 (1918), is similar. The alleged possession was referable to a joint occupancy with vendor by virtue of the relation of husband and wife.

[78] 81 So. (Ala.) 682 (1919).

[79] 5 My. & Cr. 167 (1839).

[80] 99 S. E. (W. Va.) 457 (1919).

field [81] a young man agreed to work and care for an older man and his wife during their lives, for which he was to be given half of their property on their death. The case was held to be taken out of the Statute of Frauds inasmuch as the plaintiff had given up other opportunities in life and had rendered a kind of service which could not be adequately compensated for in money. It should be noted that the same court has denied specific performance where the services were of such a nature as to admit of reasonable valuation.[82] In *Aldrich* v. *Aldrich* [83] a son contracted to care for his father, who was to leave land to the son. There was evidence that the father had put the son in possession and that although both were living on the land he treated the son as in exclusive control. But the court said that the contract did not contemplate possession till the father's death and that possession or improvements by the son were not necessary to take the case out of the statute. *Weir* v. *Weir* [84] was a similar case where a grandson went on his grandfather's farm and cared for him under a contract that he was to have the land. The same court denied specific performance on the ground that he did not have possession and could be compensated for his services by a claim against the estate. Although the point is not brought out, it is possible that in the former case the Statute of Limitations had run against the claim for a part of the services rendered. This has been made a controlling consideration by courts that follow Lord Cottenham's theory in this class of case.[85] *Bromeling* v. *Bromeling* [86] involved an oral contract with an adopted son that in consideration of the father's being allowed to use the son's land for life, he would leave all his property to the son by will. The case was held to be taken out of the statute by the father's use of the son's land although a restitution of the value of use and occupation would seem to have been feasible. In *Eastman* v. *Eastman* [87] there was an oral agreement to devise land in return for

[81] 104 Kan. 587, 180 Pac. 208 (1919).

[82] Baldwin *v.* Squier, 31 Kan. 283, 1 Pac. 591 (1884); Renz *v.* Drury, 57 Kan. 84, 45 Pac. 71 (1896).

[83] 287 Ill. 213, 122 N. E. 472 (1919).

[84] 287 Ill. 495, 122 N. E. 868 (1919).

[85] Warren *v.* Warren, 105 Ill. 508 (1882). But query whether there is a greater hardship than is involved in cases of payment of the purchase price to an insolvent vendor.

[86] 202 Mich. 474, 168 N. W. 431 (1918).

[87] 117 Me. 276, 104 Atl. 1 (1918).

services. After pleading the statute, defendant abandoned the point and urged that the remedy at law was adequate. This was clearly not well taken. The question here is not one of jurisdiction but of whether the plaintiff can be so far fairly compensated by restitution or a money equivalent that it is more equitable to undo what has been done, in view of the statutory bar. *Signaigo* v. *Signaigo* [88] was a suit to enforce a parol contract with plaintiff's parents to adopt plaintiff as defendant's child and to leave property to plaintiff as to defendant's own child. A like contract with plaintiff was also relied on. A majority of the court (three judges dissenting) granted specific performance solely on the basis of the services rendered. The majority of the court speak of impressing the property with a constructive trust. But that is only saying that they enforce specific performance. Their argument in this connection would point rather to imposing an equitable charge in order to enforce restitution for the services rendered, which do not appear to have been of a special character. The dissenting judges say (per Walker, J., p. 32):

"The necessary, and in fact, the only parties to a contract of adoption are the natural and the adoptive parents. The child in the eye of the law, whether its relation to the transaction be considered under the statute or in equity, is the subject-matter. Its mental attitude, therefore, or its subsequent conduct, cannot properly be shown to affect its legal status. If this be true, then it is a mere toying with words to argue that the relation created is one which may be established by the proof of the performance on the part of the child of all the duties the relation entails, and, as a consequence, that the case is relieved from the limitations of the statute of frauds, and may be established as any other contract."

This seems unanswerable. Succession to property is a result of the relation contracted for, not the subject matter of the contract. To treat such cases as contracts to leave land by will, partly performed, is often to make a new contract for the parties because of the hardship on the plaintiff, quite after the manner of the seventeenth century.[89] But American cases have generally taken this course on the ground that compensation for the value of the serv-

[88] 205 S. W. (Mo.) 23 (1918).

[89] *E.g.*, "implied contracts" to make the informally adopted child an heir. Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54 (1894).

ices rendered by the child would be wholly inadequate.[90] It is noteworthy that a strong minority of one of the courts that has gone far in this direction is now ready to stop. It is also noteworthy that another court, on substantially the same facts, denied relief upon the authority of a decision that a contract to adopt and to leave property to the adopted child did not preclude disposition of the property *inter vivos*.[91] Here too we may perceive signs of a return to stricter views in accord with the policy of the statute.

Little need be said of the numerous cases of parol gifts of land acted on by the donee. *Howard* v. *Stephens*,[92] *Fowler* v. *Isbell*,[93] *Raymond* v. *Hattrick*,[94] *Berry* v. *Berry* [95] and *Peixouto* v. *Peixouto* [96] are ordinary cases of parol gift followed by taking of possession and making of substantial improvements. Perhaps it should be noted that in *Berry* v. *Berry* the court is conscious that there is another difficulty in these cases, over and above the Statute of Frauds, and so speaks of a "meritorious consideration" because of the relationship between donor and donee. The cases recognize that there must be the substance of a common-law conveyance, and hence refuse relief unless it is shown that possession was taken with the assent of donor [97] or where donee merely continues in a prior possession.[98] Also donee must make substantial improvements or otherwise change his position for the worse on the faith of the gift.[99] That is, there must be substantial reason for treating the donee as an equitable owner, seeking relief *quia timet*. All this merely follows the settled line of authorities and what is conceived

[90] McCabe *v.* Healy, 138 Cal. 81, 70 Pac. 1008 (1902); Bichel *v.* Oliver, 77 Kan. 696, 95 Pac. 396 (1908); Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4 (1899); Nowack *v.* Berger, 133 Mo. 24, 34 S. W. 489 (1896); Kofka *v.* Rosicky, 41 Neb. 328, 59 N. W. 788 (1894); Van Duyne *v.* Vreeland, 12 N. J. Eq. 142 (1858); 11 Id. 370 (1857); Quinn *v.* Quinn, 5 S. D. 328, 58 N. W. 808 (1894). But see the vigorous observations of O'Brien, J., in Mahaney *v.* Carr, 175 N. Y. 454, 458–460, 67 N. E. 903 (1903).

[91] Wright *v.* Green, 119 N. E. (Ind. App.) 379 (1918), following Austin *v.* Davis, 128 Ind. 472, 476, 26 N. E. 890 (1891), where, however, the suit was to set aside conveyances made in the lifetime of the adopter.

[92] 27 Cal. App. 409, 176 Pac. 65 (1918).

[93] 202 Mich. 572, 168 N. W. 414 (1918).

[94] 104 Wash. 619, 177 Pac. 640 (1919).

[95] 99 S. E. (W. Va.) 79 (1919).

[96] 181 Pac. (Cal. App.) 830 (1919).

[97] Martin *v.* Martin, 207 S. W. (Tex. Civ. App.) 188 (1918).

[98] Casady *v.* Casady, 169 N. W. (Ia.) 683 (1918).

[99] Kendall *v.* Metroz, 176 Pac. (Col.) 473 (1918) (*semble*); Martin *v.* Martin, 207 S. W. (Tex. Civ. App.) 188 (1918); Ludwig *v.* Ludwig, 172 N. W. (Wis.) 726 (1919).

to be the sound principle. I have discussed the theory of such cases at some length in a recent paper.[100]

14. Plaintiff's Default or Laches

Because equity treats an impossible or illegal condition precedent in a will of personalty *pro non scripto*, and because in case of a condition subsequent in a mortgage or other security equity interferes to give effect to the substance of the transaction as against the form, attempts have always been made to induce the chancellor to make new contracts by dispensing with express conditions precedent where the circumstances work a hardship upon one of the parties. But the case of legacies on impossible or illegal conditions precedent is an anomaly, borrowed by eighteenth-century equity from the Roman law,[101] and the interference of equity to prevent forfeitures is no analogy. Until the condition precedent has been performed, nothing has been acquired. Hence as a general rule courts of equity have properly refused to dispense with such conditions. A typical case is failure to exercise an option within the time fixed.[102] Suppose, however, performance of the condition precedent requires a series of successive acts and after doing some of them the holder of the option does not do the rest within the specified time? As was seen in another connection,[103] there are *dicta* that there is a conversion in these option contracts from the date of the option, subject to a reconversion if the condition is not ultimately performed. On this basis, the ultimate reconversion looks very like a forfeiture and courts often make inquiry as to how far time is "of the essence" in such cases, as if the question were one, not of performance of an express condition precedent according to its terms, but of non-performance of one of the promises in a bilateral contract and whether such breach coming after

[100] "Consideration in Equity," Wigmore Celebration Essays, 435, 440–443, 13 Illinois L. Rev. 667, 672–675. In connection with the idea of giving possession as equivalent to the substance of a common-law conveyance, one might compare Roman equity which treated a will sealed by seven witnesses as the substantial equivalent of the formal *testamentum per aes et libram* with *libripens, familiae emptor* and five witnesses.

[101] I have discussed this matter in a paper entitled "Legacies on Impossible or Illegal Conditions Precedent," 3 Illinois L. Rev. 1, 13–20.

[102] Two cases of this sort during the past year are: Virginia Mining Co. *v.* Haeder, 181 Pac. (Idaho) 141 (1919); Lau *v.* McKechnie, 202 Mich. 284, 168 N. W. 438 (1918).

[103] 33 Harv. L. Rev. 813, 825, n. 59.

part performance went to the root or essence of the contract.[104] But on principle and on authority we cannot speak of a conversion in such cases. Nevertheless, where acts have been done toward performance of conditions precedent, courts have sought to prevent unjust enrichment of vendor at purchaser's expense by enforcing the option contrary to its terms.[105] *Lauderdale Power Co.* v. *Perry*[106] takes the better course of requiring vendor to reimburse purchaser for improvements made in the endeavor to perform the condition, though not for expenditures by purchaser which did not ultimately inure to vendor's benefit. In *Hughes* v. *Holliday*[107] also, where the option contract called for successive payments, of which one was made but the other was tendered too late, specific performance was denied. These decisions are right. Unless purchaser has gone so far in exercise of the option that by a fair interpretation of its terms he may be made to go on, the vendor-purchaser relation has not arisen.

Nothing new is brought out in the many cases as to provisions that time shall be of the essence, that upon non-performance at the time fixed the contract shall come to an end, that upon such default the purchaser's rights shall be forfeited, and the like. While courts of equity generally construe the contract against vendor in these respects and require express and unequivocal language,[108] the Supreme Court of Kansas, following a line of past decisions, will give to a forfeiture clause, which is in terms a condition subsequent, a construction making it a condition precedent.[109] It will suffice to refer to Pomeroy's convincing criticism of those decisions.[110] For the rest, we may note that in California, one of the states going a great way in holding that there are precedent conditions in such cases, when time is expressly made of the essence, a purchaser who has partly performed, forfeits all rights in the land and all payments made in case he defaults as to time, without any affirmative action

[104] A recent case so arguing is Hughes *v.* Holliday, 99 S. E. (Ga.) 301 (1919).

[105] Coles *v.* Peck, 96 Ind. 333 (1884); Strohmaier *v.* Zeppenfeld, 3 Mo. App. 429 (1877).

[106] 80 So. (Ala.) 476 (1918).

[107] 99 S. E. (Ga.) 301 (1919).

[108] Sharshel *v.* Smith, 181 Pac. (Colo.) 541 (1919); *Re* Boshart's Estate, 188 App. Div. 788, 177 N. Y. Supp. 574 (1919); Kemmerer *v.* Title & Trust Co. 90 Ore. 137, 175 Pac. 865 (1918).

[109] Pickens *v.* Campbell, 104 Kan. 425, 179 Pac. 343 (1919).

[110] 1 POMEROY, EQUITY JURISPRUDENCE, §§ 365, n. 1, 368, n. 1.

by vendor.[111] No doubt this is the logical result of treating such provisions as conditions precedent. But even so, why not do as is done in the option cases and prevent unjust enrichment of vendor at purchaser's expense by taking an account of the payments, interest, value of use and occupation, and the like, and striking a balance? [112]

Strict doctrines as to forfeiture inevitably produce loose doctrines as to "waiver." Where before time for performance vendor signifies his intention not to insist on timely or exact performance and purchaser, in reliance thereon, acts accordingly, the principle of equitable estoppel is quite sufficient to preclude insistence upon the condition to purchaser's injury. *Heagy* v. *Steinmark* [113] and *Wolford* v. *Jackson* [114] involve "waiver" of this sort. But where courts are strict in enforcing forfeiture clauses, and provisions as to time being of the essence are treated as amounting to conditions precedent under all circumstances, vendor is held to "waive" the condition, even after the time has passed, by showing an intention not to rely on it.[115] In such cases the courts speak of "intentional relinquishment of a known right" [116] — somewhat on the analogy of abandonment of chattels or abandonment of water rights — although in the latter cases there are overt acts of giving up possession as well as declared intention, and in other cases of relinquishment of rights intention as such does not avail without seal or consideration. A new and anomalous category of common-law legal transactions seems to be arising, partly out of a natural and inevitable tendency to enforce declared intention simply as such, to which the law must yield, but partly also from a desire to avoid harsh results required by a harsh doctrine that runs counter to the very genius of equity. Where manifested intention not to insist on the terms of the contract after time for performance has

[111] Fresno Irrigated Farms Co. *v.* Canupis, 27 Cal. App. 859, 178 Pac. 300 (1918).

[112] Drinkle *v.* Steedman, [1916] A. C. 275, 281.

[113] 180 Pac. (Colo.) 93 (1919).

[114] 123 Va. 280, 96 S. E. 237 (1918).

[115] Andrews *v.* Karl, 29 Cal. App. 462, 183 Pac. 838 (1919); Kohler *v.* Lundberg, 180 Pac. (Utah) 590 (1919).

[116] Grippo *v.* Davis, 92 Conn. 693, 104 Atl. 165 (1918). "Waiver depends on what one himself intends to do; estoppel depends on what he caused his adversary to do. . . . In other words, waiver is a voluntary act or declaration whereby the waiver surrenders some privilege or right." Mitchell *v.* Hughes, 80 Or. 574, 581; Smith *v.* Martin, 185 Pac. (Or.) 236 (1919).

passed is held a "waiver" it seems such waiver only suspends vendor's right. He may revive it by giving notice.[117] In other words, purchaser is given a reasonable time to redeem after notice. This desirable and equitable result is hardly consistent with the idea that there is a condition precedent and that purchaser acquires no rights until after timely performance.

Two cases of parol gift and part performance raise interesting questions as to laches and the Statute of Limitations. In *Raymond* v. *Hattrick* [118] the court said it would follow the analogy of the Statute of Limitations, but that, where no time for conveyance was fixed, there was no laches in not suing till after refusal to perform, although no demand was made in a reasonable time, where there was an intimate relationship and confidence between the parties. In that case donors were the parents of donee's wife. If the case is treated as one of specific performance, delay longer than the period of the statute would seem to involve more than a question of laches. For the Statute of Limitations in Washington applies to equity as well as to actions at law.[119] Delay for a less period may be laches. Delay for a longer period is governed by the statute. Moreover it can hardly be said that there was a fiduciary relation between the parties which called for repudiation by the donor and notice to the donee to set the statute to running. Yet the result is quite right. If we think of the donee in such a case as holding possession under what equity regards as the substance of a common-law conveyance and suing *quia timet* to prevent inequitable assertion of the bare legal title by donor, we shall see that limitation and laches have no application. The case is on the same basis as a suit to quiet title.[120] In *Peixouto* v. *Peixouto* [121] the court treated donor in the parol gift after donee had taken possession and made improvements as trustee and then applied the rules as to limitations in case of trustee of an express trust. But this straining of the

[117] Andrews *v.* Karl, 29 Cal. App. 462, 183 Pac. 838 (1919). Bishop *v.* Barndt, 184 Pac. (Cal. App.) 901 (1919). Compare the proposition that time may be made of the essence by giving notice. Parkin *v.* Thorold, 16 Beav. 59 (1852); Stickney *v.* Keeble, [1915] A. C. 386; Taylor *v.* Goelet, 208 N. Y. 253, 259, 101 N. E. 867 (1913); FRY, SPECIFIC PERFORMANCE, §§ 1092–1099.

[118] 104 Wash. 619, 177 Pac. 640 (1919).

[119] 1 REM. & BAL. CODES, §§ 153, 158, 159, 165.

[120] See WOOD, STATUTES OF LIMITATION, §§ 218–219.

[121] 181 Pac. (Cal. App.) 830 (1919).

trust analogy is quite unnecessary to reach the result. It is submitted that there are five analogies to be considered where courts of equity are called on to determine whether there has been lache's following the analogy of the Statute of Limitations, or to choose which provision of the statute is controlling, where the Statute of Limitations governs in equity. If nothing has been paid or done by the purchaser, the analogy should be an action upon the contract. Where the vendor-purchaser relation exists and purchaser has paid money or performed service, the analogy should be redemption. If purchaser in possession as equitable owner is dispossessed by vendor who has only bare legal title, it should be ejectment.[122] If the whole purchase price has been paid but vendor remains in possession, it should be trust. If purchaser in possession has done everything to be done on his part but vendor retains the bare legal title with no substantial interest, the analogy should be that of a suit to quiet title.

15. Hardship and Unfairness

Two cases call for passing mention. *Bartley* v. *Lindabury* [123] is a case of a contract fairly made but so improvident and so hard upon the defendant, if specifically enforced, as to move the chancellor to deny specific performance.[124] *Kurtz* v. *De Johnson* [125] is similar except that defendant may be said to have fairly taken the risk. An aunt contracted with her niece to devise land to her if she would live with the aunt until the niece was married. In the event the niece married within three years, while the aunt lived fifteen. Here there were two possibilities to consider, namely, the aunt's dying and the niece's marrying. In similar cases where the only contingency is that the person contracting for a companion may not live long enough to derive much benefit from the bargain, courts have enforced the contract specifically when fairly made.[126] Perhaps the court thought the assumption of this double risk by the aunt too improvident.

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[122] Varick *v.* Edwards, 11 Paige (N. Y.), 289 (1844).

[123] 89 N. J. Eq. 8, 104 Atl. 333 (1918).

[124] Compare Wedgwood *v.* Adams, 6 Beav. 600 (1843); Friend *v.* Lamb, 152 Pa. St. 529, 25 Atl. 577 (1893).

[125] 29 Cal. App. 246, 183 Pac. 588 (1919).

[126] Howe *v.* Watson, 179 Mass. 30, 60 N. E. 415 (1901); Dalby *v.* Maxfield, 244 Ill. 214, 91 N. E. 420 (1910); Campbell *v.* McLaughlin, 205 S. W. (Mo.) 18 (1918).

16. Mutuality

There are a large number of cases raising different aspects of this subject which would afford ground for extended discussion if there were space therefor. But this must be reserved for a future paper. Suffice it to call attention to *Schuyler* v. *Kirk Brown Realty Co.*,[127] in which Ross, J., in an admirable opinion reviews the decisions in New York, shows that the *dicta* as to mutuality of remedy have gone beyond the requirements of the decisions in which they are found, and expounds the sound theory of mutuality of performance.

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[127] 178 N. Y. Supp. (N. Y. App.) 568 (1919).